United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-5011

Docket No. 75-5011

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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P/S

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In re NAT FAYE, individually, formerly a member of a partnership with MEYER FITCHEK and PAUL SALLECK d/b/a EMENES TRADING and with LAWRENCE KARES d/b/a C&F DISTRIBUTING CO.,

Bankrupt.

- -

NAT FAYE, Bankrupt,

Appellant,

-against-

KENNETH A. ZITTER, Trustee,

Appellee.

- -

On Appeal from the United States District Court for the Southern District of New York

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APPELLEE'S BRIEF

KENNETH A. ZITTER
Trustee
One Battery Park Plaza
New York, New York 10004

2

TABLE OF CONTENTS

TABLE OF CASES

STATUTES AND OTHER AUTHORITIES

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- -

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Preliminary Statement

This is an appeal from the Order of Honorable Dudley B. Bonsal, United States District Judge for the Southern District of New York, dated May 15, 1975 which affirmed the memorandum decision and order of Honorable Edward J. Ryan, Bankruptcy Judge, dated November 26, 1974 which denied a discharge in bankruptcy to the bankrupt.

Issues Presented

1. Were the findings of the Bankruptcy Judge, as affirmed by the District Court, clearly erroneous.

A. The Bankruptcy Judge's Finding as Affirmed by the District Court that the Bankrupt Knowingly and Fraudulently Made a False Oath in Connection with the Purchase of the 10.5 Carat Diamond Ring was Not Clearly Erroneous.

B. The Bankruptcy Judge's Finding as Affirmed by the District Court that the Bankrupt Knowingly and Fraudulently Concealed the 10.5 Carat Diamond Ring from the Trustee was Not Clearly Erroneous.

2. Is the "preponderance of the evidence" burden of proof standard the proper standard.

Prior Proceedings

On September 15, 1971, appellant Nat Faye ("Faye") filed a voluntary petition in bankruptcy. After conducting an examination into his affairs, the Trustee filed three specifications of objections to the bankrupt's discharge on October 5, 1972. A copy of said specifications is annexed hereto as Exhibit "A". (See also JA-1).* The trial was held on December 18, 1972, September 7, 1973 and November 5, 1973. At the conclusion of the first portion of the trial

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* Numbers in parentheses following the letters JA refer to pages in the joint appendix.

on December 18, 1972, the Bankruptcy Court held that the trustee had established a prima facie case on two of the specifications and dismissed the third specification. The substance of the two specifications as to which the trustee established a prima facie case is that Nat Faye knowingly and fraudulently made a false oath in relation to his bankruptcy proceeding when he testified about the circumstances surrounding the purchase of a 10.5 carat diamond ring, and that Nat Faye knowingly and fraudulently concealed from the trustee said 10.5 carat diamond ring which has a value of approximately $15,000.

Bankruptcy Judge Ryan, after hearing the witnesses and reviewing the evidence, and mindful that denial of a discharge is a most punitive measure, held in his memorandum decision and order dated November 26, 1974, a copy of which is annexed hereto as Exhibit "B", that:

> ". . . [T]he first and third specifications of objection to discharge have been proved by the requisite preponderance of the evidence and the bankrupt must be denied his discharge." (Memo Dec. at 3, JA-247).*

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* The Rules of Bankruptcy Procedure were not in effect during the December 18, 1972 hearing when the Bankruptcy Judge held that the trustee had established a prima facie case. Under Bankruptcy Act, Section 14c, the trustee had the burden of establishing that there are reasonable grounds for believing that the bankrupt had committed an act which would prevent his discharge in bankruptcy. Then the burden of proving that he had not committed any such act shifted to the bankrupt. Bankruptcy Rule 407 mandates

The United States District Court for the Southern District of New York held that Judge Ryan's decision was not clearly erroneous and affirmed the decision. (JA-275).

Facts

On June 21, 1971, less than three months before Nat Faye, the bankrupt herein, filed his bankruptcy petition, a 10.5 carat diamond ring, costing $15,515 was taken on memo from Gimbels. (JA-59). On the next day, the ring was pledged with the Provident Loan Society of New York ("Provident") in consideration for a loan of $3,500 which was used in Faye's business to cover a shortage of funds at the bank. (JA-25-26, 48).

Bernard Choiley, the salesman for Marcus Jewelers, a leased department at Gimbels, who sold the 10.5 carat ring, testified that both Nat Faye and his wife, Harriet Faye, were present at Marcus Jewelry Store in Gimbels when the ring was purchased. (JA-10, 18). Choiley stated that

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(Footnote continued)

that the plaintiff (in this case the trustee) has the burden of proving the facts essential to support his objections to discharge.

Whether the 14c standard or the Rule 407 standard is applicable in this case is a moot question. Bankruptcy Judge Ryan's order specifically held that the objections were proved by a preponderance of the evidence, which satisfies the more stringent requirements of Rule 407.

both Mr. and Mrs. Faye came to him on two occasions during June 1971. (JA-19). On the first visit, they selected some inexpensive jewelry. (JA-17). On the second occasion they selected the 10.5 carat ring. Choiley was sure that both Mr. and Mrs. Faye were present when the 10.5 carat ring was selected.

Q. In connection with the first transaction, Mr. and Mrs. Faye came in?

A. Right.

Q. They selected some inexpensive jewelry?

A. Right.

Q. Do you know that most of those pieces were returned?

A. Definitely; they were never purchased.

Q. They were returned?

A. Yes.

Q. You then referred to another time when, you said, they both came in?

A. Yes.

Q. Are you sure Mr. Faye was there the second time?

A. Yes.

Q. What makes you so sure?

A. On the 29th [sic]* of June, the Jade piece was selected, and they mentioned

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* The date is clearly a typographical error and should read June 21. A reading of the entire record makes it very clear that Choiley was talking about the day when the ring was taken from Gimbels, which both parties stipulated was June 21. (JA-19).

the fact that they didn't want a lot of little pieces which didn't mean anything, but they wanted one important piece.

Q. Did you show them an important piece at that time?

A. I showed them a pear-shaped diamond ring. (JA-17-18).

Choiley further recalled a conversation with the Fayes when they were purchasing the 10.5 carat ring which indicates their intention immediately to pawn the ring. The Fayes told Choiley that they were going to Florida. Choiley offered to mail the ring to Florida in order to save the 6% state sales tax, which amounted to over $1,000. (JA-11) . Even though Nat Faye was experiencing financial difficulties at the time, he showed no interest in saving the sales tax, but insisted on taking immediate possession of the ring. (JA-11).

Before Choiley released the ring to the Fayes, he was required to call the Gimbels credit office for a release. (JA-19). Ruth Goodman, Manager of Gimbel's Credit Authorization Department testified that she authorized the release of the ring and made a notation to that effect on Trustee's Exhibit 3, which is a Gimbel's Credit Application, a copy of which is annexed hereto as Exhibit "C". (JA-24). Nat Faye filled out and executed said credit application when he was at Gimbels during June 1971. (JA-62-63). Thus the ring was released on his credit.

The ring was released to the Fayes on memo. (JA-5). On or about July 7, 1971, Choiley telephoned Nat Faye to finalize the sale. After some questioning by Nat Faye as to whether Choiley could lower the purchase price, Faye consented to the final sale. (JA-19-20).

Nat Faye claimed that he was not present at Gimbels when his wife took the ring although he admittedly was at the jewelry store in Gimbels during June when he signed Trustee's Exhibit 3, the credit application. (JA-56). On June 22, 1971, he requested his wife to pledge whatever jewelry she had because the bank was calling him for a shortage of money. (JA-48-50). He further claims that he first learned of the ring when Mr. Choiley phoned him on July 7, 1971, to confirm the memo sale. (JA-60). Since he felt that he needed to keep up the payments to Provident in order to preserve the ring, Faye made the required interest payment on the pledge on July 20, 1971. (JA-71). Mrs. Faye has no assets of her own with which to purchase the ring. (JA-70).

Mrs. Faye claims she had no knowledge of her husband's financial difficulties, at the time she allegedly "purchased" the diamond ring in question from Gimbels, despite the fact that on March 2, 1971 and June 16, 1971, she had pledged her jewelry at Provident at the bankrupt's request and put the proceeds into Faye's business. (JA-203-204, 207). On June 22, 1971, the date the 10.5 carat ring

was pledged, the fair value of all of Mrs. Faye's jewelry probably could not support a loan of $3,500. (JA-216).

The Bankruptcy Judge, after reviewing the entire record, held that:

> "[I]n concert, Mr. and Mrs. Faye caused the diamond ring to be purchased 'on memo' so that it could be immediately pledged with Provident Loan Society to raise cash needed by the bankrupt. I infer that the real party in interest in the transactions was the bankrupt. Cf. Lindt v. Henschel, 25 N.Y.2d 357 (1969)."

ARGUMENT

POINT I

THE FINDINGS OF FACT OF THE BANKRUPTCY COURT AS AFFIRMED BY THE DISTRICT COURT WERE NOT CLEARLY ERRONEOUS

The findings of fact of the Bankruptcy Judge as affirmed by the District Court should not be disturbed unless they are clearly erroneous. In re Ira Haupt & Co., 424 F.2d 722 (2d Cir. 1970); In re Hygrade Envelope Corp., 366 F.2d 584 (2d Cir. 1966); Simon v. Agar, 299 F.2d 853 (2d Cir. 1962) F.R.Civ.P. Rule 52(a); see e.g., Bankruptcy Rule 810.

In determining whether or not the Bankruptcy Judge's findings are clearly erroneous, this Court must particularly consider that Bankruptcy Judge Ryan had the opportunity to hear and observe the demeanor of the witnesses and found the testimony of the bankrupt and his wife lacking in credibility.

In re Robinson, 506 F.2d 1184 (2d Cir. 1974); In re Melnick, 360 F.2d 918 (2d Cir. 1966); Simon v. Agar, supra. As the court stated in In re Melnick, supra,

> "[W]e have repeatedly stressed the weight that must be accorded in such matters to the findings of the trier of the facts 'who saw and heard the witness.'" 360 F.2d at 920.

The Bankruptcy Judge found:

> "The story told by the bankrupt and his wife does not have the ring of truth. It is incredible that this very valuable diamond ring was acquired in the circumstances as claimed by the bankrupt and immediately thereafter pledged. The evidence shows that Mr. Faye was experiencing financial difficulty in the period prior to June 21, 1971. Although Mrs. Faye denied any knowledge of her husband's financial troubles, the evidence demonstrated that by direction of the bankrupt, she had pledged a considerable amount of her jewelry at the Provident Loan Society on two separate occasions, viz., March 2, 1971 and June 16, 1971. It is worthy of special note that the bankrupt listed an obligation to Gimbel's in the amount of $16,000 in his schedules and at the trial of the objections to discharge the bankrupt sought to persuade the Court that this obligation to Gimbel's was included because a husband is generally liable for 'necessaries' supplied to his wife.
>
> 'Although the Bankrupt and his wife did testify with respect to their lifestyle, this explanation is not worthy of belief. Further, although Mrs. Faye had on occasion purchased luxuries and returned them when Mr. Faye protested, I cannot and do not believe that in the circumstances of financial distress which existed on June 21, 1971, Mrs. Faye could have expected that Mr. Faye would indulge her in the purchase of so expensive an item of jewelry." (Memo. Dec. at 6-7.) (JA-250-51). Emphasis supplied.

This finding by the Bankruptcy Judge as affirmed by the District Court is not clearly erroneous, but, on the contrary, is supported by substantial evidence.

A. The Bankruptcy Judge's Finding as Affirmed by the District Court that the Bankrupt Knowingly and Fraudulently Made a False Oath in Connection with the Purchase of the 10.5 Carat Diamond Ring Was Not Clearly Erroneous

Pursuant to Section 14c of the Bankruptcy Act, the bankrupt is not entitled to a discharge if the Court is satisfied that he has committed an offense punishable by imprisonment as provided under 18 U.S.C. §152, which provides, in relevant part, as follows:

> Whoever knowingly and fraudulently makes a false oath or account in or in relation to any bankruptcy proceeding . . . shall be fined not more than $5,000 or imprisoned not more than 5 years, or both.

Thus, if the bankrupt intentionally testified falsely at any of his examinations in these proceedings regarding a material matter, he may not be granted his discharge. In re Robinson, supra; In re Melnick, supra; In re Slocum, 22 F.2d 282 (2d Cir. 1927); Metheany v. United States, 365 F.2d 90 (9th Cir. 1966), cert. denied, 393 U.S.824 (1967); Meer v. United States, 235 F.2d 65 (10th Cir.1956); 1A Collier, Bankruptcy, §14.25 (14th ed. 1975).

The Bankruptcy Judge held and the District Court affirmed that the trustee proved by a preponderance of the evidence that the bankrupt knowingly and fraudulently made

a false account at a 21a examination when he testified that the ring was not purchased with the intention of pledging it to obtain funds for his business and that he did not remember when the ring was purchased.

> "All the attendant uncontradicted circumstances require the Court to draw the inference that Mrs. Faye did acquire the ring on memorandum with the purpose of pledging it to raise cash." Memo Dec. at p. 4. (JA-248).

The uncontradicted circumstances are as follows: A 10.5 carat diamond ring was taken on memo from Marcus Jewelers on June 21 and pledged by Mrs. Faye at Provident on June 22. The $3,500 pledge was used in Nat Faye's business to cover shortages at the bank. Mrs. Faye had previously pledged a substantial portion of her jewelry at Provident on March 2, 1971 and June 16, 1971, just five days before the 10.5 carat ring was taken. Mrs. Faye had no assets of her own with which to purchase the ring. (JA-70).* The fair value of Mrs. Faye's other jewelry on June 21, 1971 would not support a loan of $3,500.

The trustee submits that these uncontradicted facts clearly demonstrate a scheme to obtain jewelry from Gimbels on credit particularly when the Bankruptcy Judge

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* The testimony of Nat Faye that Mrs. Faye had no assets of her own with which to purchase the ring flatly contradicts the bankrupt's argument at p. 6 of his brief that Mrs. Faye purchased the ring with funds she had saved.

found that the bankrupt's explanation was simply not credible.

Aside from the uncontradicted circumstances, there was other substantial evidence in the record to support the Court's decision. The six months prior to June 22, 1971, the date the ring was pledged, were times of financial difficulty for Nat Faye (JA-32). Bernard Choiley, a jewelry salesman at the Marcus Jewelry Galleries located in Gimbels Department Store, specifically recalled that on June 21, 1971, Nat Faye and Harriet Faye both came to purchase a substantial piece of jewelry. They decided upon the 10.5 carat diamond ring and took it on memorandum. When Choiley learned from the Fayes that they were planning to go to Florida, he offered to save them the state sales tax by mailing the ring to Florida. One would imagine that in times of financial difficulties, the Fayes would accept the opportunity to save the sales tax, which amounted to over $1,000. Yet the Fayes insisted on taking the diamond with them.

The very next day, the ring was pledged at Provident in consideration of a loan in the amount of $3,500 which was used in Nat Faye's business to cover shortages at his bank.

To explain the transaction, the bankrupt and his wife related an incredible tale of coincidences. According to the bankrupt and his wife, Nat Faye was not present

when the 10.5 carat diamond ring was purchased. Harriet Faye testified that she did not go to Gimbels on June 21, 1971 to purchase the ring, but went to return the other pieces which she had taken on Saturday (JA-211, 221-22).

Q. You went to purchase that ring --

A. I didn't go to purchase it. I went to return the other pieces I had taken on Saturday . . . (JA-211).

Q. At that particular time did you then ask to see another ring?

A. No. I saw it in the case as he was making out the return credit for the other jewelry, I saw the ring in the case and I asked the salesman if I could look at it, and I looked at it and I asked him about it and spoke about it and I loved it. I liked it and I said I was going to buy it. (JA-221-22).

Q. Did he [Choiley] show you the ring?

A. No sir.

Q. Did you go back there to buy the ring?

A. No, sir, I went back there to return the bracelet and to return the green and white ring that I had taken.

Q. And, you did return it?

A. Yes, I did.

Q. Did he then speak to you about buying this ring?

A. Yes, I saw it, asked him the price, asked him about it. He told me it was a terrific buy and I took the ring. (JA-166-67).

Thus the bankrupt and his wife present the story that Harriet Faye, completely unaware of her husband's financial plight, while returning some items of jewelry on June 21, 1971 which she had purchased at Gimbels on Saturday, June 19, 1971, saw the 10.5 carat diamond ring and decided to take it.

She took the ring on memo. The very next day, her husband called her and requested her to pledge whatever jewelry she had to raise $3,500 to cover shortages at the bank. Without realizing that she had taken the ring on memo, and without mentioning to Nat Faye that she had "purchased" it, and at a time when her remaining jewelry might not support a loan of $3,500 (JA-216), Harriet Faye took the ring to Provident and pledged it. She then gave the $3,500 in cash which she received from the pledge to Nat Faye who used the cash in his business.

The bankrupt's story must be considered against the background that on June 16, 1971, just five days prior to the purchase of the 10.5 carat ring at issue, Harriet Faye pledged a diamond-mounted gold evening bag, a diamond pendant and a stone necklace at Provident. Approximately three months prior to that, on March 2, 1971, Harriet Faye pledged at Provident a diamond ring, two diamond ear clips, two diamond pins, a diamond necklace and a diamond watch bracelet. (Trustee's Exhibit 5 annexed hereto as Exhibit "D"). It seems highly incredible that a woman with most of her jewelry in pledge, would just happen to purchase a

new large diamond ring. It is reasonable to infer that if the bank was calling Nat Faye on June 22, 1971 regarding shortages, he knew prior to that day that there would be such shortages.

In his brief on this appeal at page 7 the bankrupt argues that Mrs. Faye had made such large purchases before. The evidence, however, indicates that all of the prior large purchases which she made were returned. (JA-67, 196). On at least two of the prior occasions, one of the reasons why Mrs. Faye returned the jewelry was that Mr. Faye felt that it was too expensive. (JA-183,185).

On these facts, the trustee submits that the Bankruptcy Judge's determinations as affirmed by the District Court were not clearly erroneous when he found that Nat Faye made a false oath when he stated at his 21A examination:

> "Question: To your knowledge, did Mrs. Faye purchase the ring with the intention of pledging it subsequently to obtain funds to --
>
> "MR. LEINWAND: I object to that, Your Honor.
>
> "THE REFEREE: Overruled.
>
> "Answer: No.
>
> "Question: No, she --
>
> "Answer: She did not" (JA-31-32).

The Bankruptcy Judge was not clearly erroneous when he further found that Nat Faye made a further false oath when he stated:

"Question: Well, do you recall if she purchased that ring within the three or four months within your filing your petition in bankruptcy?

"Answer: You mean after my petition?

"Question: No, before.

"Answer: I don't know exactly when she bought it, but I believe it was longer than that. I don't know exactly, but --

"Question: Was it a year before you filed your petition, September --

"Answer: I don't remember. She went out and bought the ring." (JA-29).

This was false testimony in regard to a material matter. In Metheany v. United States, supra, the standard for materiality was set forth:

> 1. Perjured testimony to be material need not be directly to the main issue; if it has a tendency to prove any material fact in the chain of evidence, that makes it material. . . . the term 'material matter' refers not only to the main fact which is the subject of the inquiry, but also to any fact or circumstances which tends to corroborate or strengthen the proof adduced to establish the main fact. 365 F.2d at 93.

In Metheany, a lawyer was convicted for making a false account in relation to a bankruptcy proceeding for, among other grounds, testifying falsely as to the date on which he ceased to represent a corporation. The Court found that the time the lawyer ceased to represent the corporation was relevant and might tend to shed considerable light upon the ownership of certain moneys which the lawyer held and which he was convicted of withholding from the trustee.

Similarly in our situation, whether or not the ring was purchased with the intention of pledging it to obtain funds to be used in Nat Faye's business and the time when the ring was purchased was relevant to the trustee's ability to prove that the 10.5 carat diamond ring belonged to the bankrupt and is an asset of this estate. The ring is a substantial asset over and above the $3,500 advanced by Provident. Otto Katz, a jewelry expert, testified that the ring has a wholesale value of approximately $30,000. (JA-27).

In his brief at p. 6 and p. 10, the bankrupt argues that Bankruptcy Judge Ryan erroneously relied on his finding that the ring was sold "on memo". To support that position, the bankrupt improperly included in the Joint Appendix a copy of an affidavit of a Robert J. Mulligan which was not part of the record below nor was it part of the joint appendix which was forwarded to the trustee for review prior to the date on which the record in this matter was filed. Mr. Mulligan, however, does not claim in his affidavit that this transaction was not "on memo". What the Bankruptcy Judge meant when he found that the sale was on memo was that the ring was taken from Gimbels on June 21 and pledged on June 22 although the sale was not finalized until July 7 - a finding which is uncontested on the record (JA-26). Indeed the bankrupt himself

admitted that his wife told him that the ring had been taken on memo. (JA-53).

Mr. Mulligan further states in his affidavit that the ring was sold to Mrs. Faye. To bolster this position the bankrupt, again improperly, included a copy of the summons and complaint which Gimbels served on Mr. and Mrs. Faye to recover the purchase price of the ring. First, both Mr. Mulligan and the summons and complaint could have been but were not introduced at the trial of this matter, where they could have been the subject of cross-examination. Second, the Bankruptcy Judge had before him the fact that this sale was made on a credit card issued to Mrs. Nat Faye (JA-14) but found, on all the evidence, that Nat Faye was the real party in interest and, under New York state law, as will be discussed at page 20 infra, that the ring was an asset of Nat Faye.

The Bankruptcy Court's finding as affirmed by the District Court that Nat Faye made false accounts regarding a material matter, therefore, is not clearly erroneous and the bankrupt's discharge must be denied.

B. The Bankruptcy Judge's Finding as Affirmed by the District Court that the Bankrupt Knowingly and Fraudulently Concealed the 10.5 Carat Diamond Ring from the Trustee was Not Clearly Erroneous

Knowingly and fraudulently concealing items of property belonging to the bankrupt estate is an offense

punishable by imprisonment under 18 U.S.C. §152. In order to show that reasonable grounds exist for believing that the bankrupt has committed this offense, the following elements must be proved:

A. There must be a concealment of property belonging to the bankrupt estate;

B. The concealment from the trustee must be by the bankrupt.

C. The property must be knowingly and fraudulently concealed. See 1A Collier, Bankruptcy, ¶14.19 (14th ed. 1975).

The Bankruptcy Court concluded and the District Court affirmed that there was fraudulent concealment of an asset and such finding is not clearly erroneous.

A. There was a concealment of property belonging to the bankrupt estate.

The bankrupt failed to list the 10.5 carat diamond ring as an asset of his estate. It is the bankrupt's position tht the ring was not his property, but rather the property of his wife. (JA-17). As discussed above, the bankrupt obtained this ring on credit pursuant to a plan to pledge it immediately in order to obtain funds to be used in his business. Under these circumstances, as the Bankruptcy Judge found and the District Court affirmed, the ring belongs to Nat Fay and not to his wife.

In Lindt v. Henshel, 25 N.Y. 2d 357 (1969), the Court enumerated the factors to be taken into consideration to determine if property purchased by a spouse is in fact her husband's property. The Court considered whether (a) the wife in purchasing the property acted on her own initiative, (b) she acted without any prior arrangement with her husband, (c) she was the only one present when the property was purchased, (d) who desired to make the purchase, (e) whose account it was charged to, and (f) who paid for it. The Court in Lindt held that the property belonged to the wife because of all the factors listed, the husband only paid the purchase price. The Lindt court further stated that if the evidence established that the wife was acting as the agent of the husband, the property would belong to him.

In the case at bar, Harriet Faye had no independent assets from which to make the purchase; the purchase was made with prior arrangement with her husband, and not on Harriet's own initiative; Nat Faye was present at the time of the purchase; the application for credit upon which the ring was charged was signed by Nat Faye; and the entire purpose of the transaction was to obtain funds for Nat Faye's use. Under the criteria set forth in Lindt, the ring is an asset of Nat Faye's estate which would pass to the trustee in bankruptcy. Thus the ring is an asset of the bankrupt estate.

Lindt was cited by the Bankruptcy Judge in concluding that the bankrupt was the real party in interest. The bankrupt in his brief makes no attempt to distinguish the case.

B. The ring was concealed by the bankrupt from the trustee.

As will be discussed further below, the bankrupt, Nat Faye, failed to list the 10.5 carat diamond ring as an asset in his schedules. The effect of a concealment was that the trustee was not aware of a substantial asset which could be used to pay creditors.

C. The bankrupt knowingly and fraudulently concealed the ring.

At the trial, the trustee established at the first hearing that there was reasonable cause to believe that the bankrupt had concealed the 10.5 carat diamond ring. On behalf of the bankrupt, Elliot Krause ("Krause"), the bankrupt's attorney, testified that it was upon his advice that the bankrupt listed a $16,000 obligation to Gimbels representing the purchase price of the ring, as his obligation because Nat Faye might be responsible for the purchase price if the ring were found to be a necessary. (JA-142, 148, 154). There was no discussion between Krause and the bankrupt regarding the circumstances surrounding the purchase of the diamond ring, nor whether the ring was an asset of Nat Faye or Harriet Faye.

"Q. Mr. Krause, what did you learn at any of these three meetings about Mr. Faye, about any purchase of a diamond ring by his wife?

A. Nothing.

Q. Did you inquire?

A. No.

Q. Did Mr. Faye say anything at that time about that?

A. Not that I recall.

Q. Did Mr. Leinwand ever mention to you that Mr. Faye had mentioned it to him?

A. Not that I recall." (JA-147-48).

In fact, Krause testified that prior to the time the schedules were executed by Nat Faye, he did not know what the $16,000 obligation to Gimbels was for. (JA-131-32). Krause also admitted that he was unaware that the 10.5 carat ring was purchased on one day and pawned the next (JA-155) and that he didn't know who had gone to Gimbels to purchase the ring. (JA-150, 153-43).

Although it is by no means clear from the record, it appears that as to the bankrupt's schedule of assets, Krause listed whatever Faye said where his assets. (JA-156, 161). Upon Faye's assertion that they were his assets, Krause included in the schedules other pawn tickets, secured by jewelry, which Faye claimed belonged to his wife. (JA-157-161).

The bankrupt argues at p. 9 of his brief that there was a conflict of interest between himself and his attorneys who were trying the case on objections to discharge. The bankrupt, however, does not specify what was the nature of the conflict. It would, indeed, seem that the bankrupt and his attorneys had a unity of interest in revealing the circumstances surrounding the preparation of the schedules. Further, the bankrupt was present during the colloquy on pages 35-37 of the Joint Appendix regarding the issue of his attorneys continuing to represent him and was made aware of the problem of representation which the Bankruptcy Judge raised.

Accordingly, there is substantial evidence to support the Bankruptcy Judge's finding as affirmed by Judge Bonsal that Nat Faye knowingly and fraudulently concealed the ring by failing to include it as an asset in his bankruptcy schedules. Therefore, the denial of his discharge must be upheld.

POINT II

THE PREPONDERANCE OF THE EVIDENCE BURDEN OF PROOF STANDARD IS THE PROPER STANDARD

Bankruptcy Rule 407, which supersedes in part Bankruptcy Act §14c, provides that at the trial on objections to discharge, the trustee has the burden of proving the facts essential to the objections. No distinction is drawn by the

rule with respect to the burden of proof standard between the grounds for objection to discharge based upon a violation of 18 U.S.C. §152 and the other statutory grounds for objection to discharge. The Bankruptcy Judge held and the District Court affirmed that the trustee had proved his case by a preponderance of the evidence. (JA-247). No case cited by the bankrupt has ever held that the trustee must, as the bankrupt contends, prove the specifications of objection to discharge based on a violation of 18 U.S.C. ¶152 beyond a reasonable doubt.

The trial on the specifications of objections to discharge is a civil and not a criminal proceeding. In re Lally, 255 F.358 (N.D.N.Y. 1919); 1A Collier, Bankruptcy ¶14.10 (14th ed.1975). Thus the standard of proof applicable in all civil proceedings - the preponderance of the evidence - is appropriate. As the court stated in In re Lally, supra,

> "The question of discharge is a civil action or proceeding, and not a criminal case, although it may involve a criminal act or acts, and in such case it is the duty of the court or jury to resolve the issues of fact according to a reasonable preponderance of the evidence." 255 F. at 363.

See also United States v. Regan, 232 U.S. 37, 47-48 (1914). Contrary to the bankrupt's argument at p. 8 of his brief, a finding by the Bankruptcy Judge that the bankrupt has committed an offense under 18 U.S.C. §152 does not subject the bankrupt to criminal liability. The bankrupt cannot be subject to criminal liability without a plenary criminal trial

at which the prosecution would have to prove his guilt beyond a reasonable doubt.

It has often been held that a discharge is not a right but a privilege granted to an honest debtor under the Bankruptcy Act. Williams v. U.S. Fidelity Co., 236 U.S. 549 (1915); In re Hammerstein, 189 F. 37 (2d Cir. 1911); 1A Collier, Bankruptcy, §14.02 (14th ed. 1975). As a privilege, there is no violation of substantive due process, as claimed by the bankrupt, nor is it unfair for Congress to require that the objector prove the objections to discharge by a preponderance of the evidence rather than beyond a reasonable doubt. The bankrupt's argument that the standard of proof in the trial on the objections to discharge based on violation of 18 U.S.C. §152 should be beyond a reasonable doubt is a novel position which has no support in either law or policy.

CONCLUSION

The order of Honorable Dudley Bonsal dated May 15, 1975 which affirmed the memorandum decision and order of Judge Ryan, dated November 26, 1974, sustaining the trustee's specifications of objection to discharge, Nos. 1 and 3, and denying the bankrupt's discharge should be affirmed in all

respects; this appeal should be dismissed; and the trustee should have such other and further relief as is just.

Respectfully submitted,

KENNETH A.ZITTER, Trustee
One Battery Park Plaza
New York, New York 10004

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

In the Matter

of

NAT FAYE,

Bankrupt.

In Bankruptcy

No. 71 B 90[illegible]

- x

SPECIFICATIONS OF OBJECTIONS
TO DISCHARGE

TO THE HONORABLE EDWARD J. RYAN, REFEREE IN BANKRUPTCY:

KENNETH A. ZITTER, of One Battery Park Plaza, New York, New York 10004, as Trustee of the Estate of Nat Faye, the above-named bankrupt, having examined into the acts and conduct of Nat Faye, bankrupt, and being satisfied that probable grounds exist for the denial of the discharge of said bankrupt, does hereby oppose the granting to said bankrupt of a discharge of his debts, and specifies the following as grounds of objection:

1) The bankrupt has committed an offense punishable by imprisonment as provided under 18 U.S.C. §152, in that the bankrupt knowingly and fraudulently made a false oath in relation to this bankruptcy proceeding in that the verified schedules filed by him herein, failed to list several items of jewelry, including, but not limited to, a 10 karat diamond ring;

2) The bankrupt has failed to keep and/or preserve books of account or records from which his financial condition and business transactions might be ascertained: and

Exhibit A

3) The bankrupt has committed an offense punishable by imprisonment as provided under 18 U.S.C. §152 in that the bankrupt knowingly and fraudulently made a false oath in relation to this bankruptcy proceeding by testifying, under oath, to the effect that his wife had purchased a certain 10 karat diamond ring with her own funds approximately six months prior to the time the ring was pledged to the Provident Loan Society on June 22, 1972; that the ring was not purchased with the intention of pledging it to obtain funds for the bankrupt and that the bankrupt had no knowledge of the purchase of the ring until some extended period thereafter. That the bankrupt so testified is evidenced by the excerpts from the transcript of the adjourned first meeting of creditors held on September 19, 1972, which are annexed hereto and made a part hereof as Exhibit "A." In fact, the diamond ring in question was not purchased with his wife's funds, but was purchased on credit from Gimbel's on June 21, 1971, one day before it was pledged to the Provident Loan Society. Moreover, the bankrupt admittedly requested his wife to pledge the ring on June 22, 1971, and admittedly received the proceeds of the loan, all of which evidences both the bankrupt's knowledge of the purchase of the ring and the fact that the ring was purchased with the intention of pledging it immediately to obtain funds for the bankrupt. As to the bankrupt's admission that he requested his wife to pledge the ring on June 22, 1971, and that he received the proceeds of the loan, annexed hereto and made a part hereof as Exhibit "B" is an excerpt from the transcript of the bankrupt's testimony at the adjourned first meeting of creditors held on September 19, 1972.

Dated: New York, New York
October 5, 1972

Kenneth Zitter
KENNETH A. ZITTER, as Trustee

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

I, KENNETH A. ZITTER, the Trustee of the estate of Nat Faye, bankrupt, named in the foregoing specifications, do hereby make solemn oath that the statements made herein are true according to the best of my knowledge, information and belief.

Kenneth Zitter
KENNETH A. ZITTER

Subscribed and Sworn to
before me this 5th day
of October, 1972

Patricia Green
NOTARY PUBLIC

PATRICIA GREEN
Notary Public, State of New York
No. 24-6041753
Qualified in Kings County
Certificate filed in New York County
Commission Expires March 30, 1974

Q Where did she have the funds to purchase the ring?

A Well, she's always had some of her own money. She's always saved some of her own money. She's had her own account and she's saved some of her own money

(A.F.M. 9/19/72, at 6)

Q Can you just try to concentrate, pin it down as to when you recall when she purchased that ring? I believe that the ring was originally pledged on June 22, 1971 to the Provident Loan Society. Do you recall how long Mrs. Faye had the ring before it was pledged?

A Well, she must have bought it within the period of '71.

Q In the period of 1971?

A That's when she must have bought it. You see, Mrs. Faye would buy things and she wouldn't tell me right away when she had bought it. She'd buy a number of things and she did a lot of shopping I didn't know about. She'd do a lot of shopping on her own.

Q She'd keep a ten carat diamond ring secretly?

EXHIBIT "A"

A Well, it's possible she would keep a ring. She once bought a bigger item than that and didn't tell me for quite a long time.

Q To your knowledge, did Mrs. Faye purchase the ring with the intention of pledging it subsequently to obtain funds to --

MR. LEINWAND: I object to that, your Honor.

THE REFEREE: Overruled.

A No.

Q No, she --

A She did not.

Q But you still can't recall when exactly she might have purchased it?

A As I told you, they wouldn't tell me. She would buy things that she wouldn't tell me when she bought it. She would tell me six months later, she would tell me.

Q Well, is it your recollection that this time she purchased it perhaps six months before June 22, 1971?

A It's in that period.

Q It's within six months of that period?

A Yes, must be within that period. I don't exactly recall when.

Q Were these times of financial difficulties for you, the six month period before June 22, 1971?

A They were financially difficult for me.

Q Mr. Faye, did you request your wife to pledge the ten carat diamond ring on June 22, 1971?

A Yes, I asked her to.

Q She pledged the ring and turned the proceeds of the loan over to you for your use; is that correct?

A That's correct.

(A.F.M. 9/19/72, at 12)

EXHIBIT "B"

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In the Matter	:	
of	:	In Bankruptcy No. 71 B 903
NAT FAYE, Individually, formerly a member of a partnership with MEYER FITCHEN and PAUL SALNICK, d/b/a EMPRESS TRADING, and with LAWRENCE KORES, d/b/a C & F DISTRIBUTION CO.,	:	
Bankrupt.	:	

Before:

HONORABLE EDWARD J. RYAN
Bankruptcy Judge

DECISION ON OBJECTIONS TO
THE DISCHARGE OF THE BANKRUPT

TO: KENNETH ZITTER, ESQ.
1 Battery Park Plaza
New York, New York 10004

LEHMANN, MARON, HEMMLER & KRAUSE, ESQS.
10 East 40th Street
New York, New York 10016

Exhibit B

Nat Faye, an experienced businessman was adjudicated bankrupt on his voluntary petition filed on September 15, 1971. Kenneth Zitter was appointed trustee in bankruptcy. After examining into the acts, conduct and property of the bankrupt, Mr. Zitter filed specifications of objections to discharge, three in number, on October 15, 1972. In substance, the trustee accuses the bankrupt in count (1) and (3) with having violated Title 18 of the United States Code, Section 152 in that he knowingly and fraudulently made false oaths in relation to the bankruptcy proceeding. In specification (2), the trustee claims that the bankrupt has failed to keep or preserve books of account or records from which his financial condition and business transactions might be ascertained.

The matter came on for trial and was several times adjourned. Testimony was taken and exhibits were received in evidence. At the trial, the Court dismissed the objection to discharge relating to the claimed failure to keep and preserve books and records. In the trustee's

post trial brief, he again argues that this objection to discharge should be sustained. I adhere to my earlier ruling. The testimony of Bernard Augen, a Certified Public Accountant, showed that the bankrupt's books were in proper condition and that his books and records as a whole were those of the average bankrupt. Mr. Augen has considerable experience and expertise in insolvency accounting.

In the first specification the bankrupt is accused of knowingly and fraudulently making a false oath by omitting from his verified schedules of assets his interest in a valuable diamond ring. The trustee in his third specification accuses the bankrupt of testifying falsely with respect to the intention with which that ring was purchased. I find that the first and third specifications of objection to discharge have been proven by the requisite preponderance of the evidence and the bankrupt must be denied his discharge.

The crux of the controversy simply stated is whether Mrs. Faye with the acquiescence of Mr. Faye acquired the 10 carat diamong ring with the intent to raise needed

cash for Mr. Faye's use in his business activities. A scrutiny of the entire record persuades me that the trustee's contentions of fact and law are correct.

During the month of June 1971 both Mr. and Mrs. Faye visited M.J. Marcus Jewelers operated under a lease in Gimbel's Department Store in New York City. On one of those occasions Mr. Faye executed the application for credit identified as Trustee's Exhibit 3. On June 21, 1971 the jewelry salesman released on memo a 10 carat diamond ring with a purchase price of $15,515. There is a controversy whether Mr. Faye was present with his wife at Gimbel's on June 21, 1971. The salesman testified that he was; the Fayes denied that he was present. Assuming that Mr. Faye was not present, his absence would not affect the outcome of the instant proceedings on the objections to his discharge. All the attendant uncontradicted circumstances require the Court to draw the inference that Mrs. Faye did acquire the ring on memorandum with the purpose of pledging it to raise cash. On June 22, 1971 the large diamond ring was pledged with the Provident Loan Society of New York as collateral for a loan of $3,500. The proceeds of the loan were used

to cover shortages in Mr. Faye's bank account.

As hereinabove mentioned the sale was "on memo". On July 7, 1971, the salesman spoke with Mr. Faye to ascertain whether the sale was to be completed. After he attempted to induce the salesman to reduce the price, the sale at the negotiated price was confirmed.

The third objection to discharge in substance alleges that Mr. Faye falsely testified at the adjourned meeting of creditors held in this court on September 19,1972, when he said in effect that the 10.5 carat diamond ring was purchased by his wife with her own funds, and when he further testified that she did not "purchase" the ring with the intention of pledging it subsequently. The transcript of the perjurious testimony is appended to the objections to discharge as Exhibits"A and B".

I am fully mindful that fraud will not be lightly inferred and that Congress designed the Bankruptcy Act to give a debtor an opportunity for a fresh start, and that denial of a discharge in bankruptcy is a most punitive measure. In re Ostrer, 393 F. 2nd 646 (2 cir. 1968); In

re Tabibian, 289 F. 2nd 793 (2 cir. 1961). However a discharge in bankruptcy is not an absolute right. Rather, it is a privilege available only to the honest bankrupt. Collier on Bankruptcy, 14th Ed., paragraph 14.02 (1).

The story told by the bankrupt and his wife does not have the ring of truth. It is incredible that this very valuable diamond ring was acquired in the circumstances as claimed by the bankrupt and immediately thereafter pledged. The evidence shows that Mr. Faye was experiencing financial difficulty in the period prior to June 21, 1971. Although Mrs. Faye denied any knowledge of her husband's financial troubles, the evidence demonstrated that by direction of the bankrupt, she had pledged a considerable amount of her jewelry at the Provident Loan Society on two separate occasions, viz., March 2, 1971 and June 16, 1971. It is worthy of special note that the bankrupt listed an obligation to Gimbel's in the amount of $16,000 in his schedules and at the trial of the objections to discharge the bankrupt sought to persuade the Court that this obligation to Gimbel's was included because a husband is generally liable for "necessaries" supplied to his wife.

Although the bankrupt and his wife did testify with respect to their lifestyle, this explanation is not worthy of belief. Further, although Mrs. Faye had on occasion purchased luxuries and returned them when Mr. Faye protested, I cannot and do not believe that in the circumstances of financial distress which existed on June 21,1971, Mrs. Faye could have expected that Mr. Faye would indulge her in the purchase of so expensive an item of jewelry.

In summary I find that in concert, Mr. and Mrs. Faye caused the diamond ring to be purchased "on memo" so that it could be immediately pledged with Provident Loan Society to raise cash needed by the bankrupt. I infer that the real party in interest in the transaction was the bankrupt. Cf. Lindt v. Henschel, 25 N.Y. 2nd 357 (1969).

Accordingly I find that the bankrupt knowingly and fraudulently made false oaths in relation to this bankruptcy proceeding in violation of Title 18, United States Code, Section 152 and he must be denied his discharge in bankruptcy. Bankruptcy Act Section 14.c.(1). It is so ordered.

DATED: New York, New York
November 26, 1974.

EDWARD J. RYAN
Bankruptcy Judge

Update
01-166-174

TYPE OF ACCOUNT (CHECK ONE)
OPTION [ ]
CEP [x]
OTHER [ ]
NO. OF PLATES 1 [ ] 2 [ ]

MR. / MRS. / MISS
IF MARRIED PLEASE USE HUSBAND'S NAME
NAT HAYE
FIRST NAME / LAST NAME
7 HARRISON ST
ADDRESS / APT. NO.
NEW YORK NY 10013
CITY, STATE / ZIP CODE
TELEPHONE NUMBER: R5 9073
NO. YRS. AT PRESENT ADDRESS: MOS.
RENT / OWN / BOARD
NO. OF DEPENDENTS
HUSBAND OR WIFE'S FIRST NAME
FORMER ADDRESS (IF LESS THAN TO PRESENT): FA Farm INC
STREET AND NO. / CITY, STATE
RENT [✓] OWN [ ] BOARD [ ]

EMPLOYMENT — HUSBAND
FIRM NAME: Nat Farm Inc
POSITION: OWNER
INCOME OR SALARY: 50,000
ADDRESS: 61 Harrison St
PHONE NO.
HOW LONG? YRS. MOS.
FORMER BUSINESS IF LESS THAN TWO YEARS AT PRESENT BUSINESS
POSITION
HOW LONG? YRS. MOS.
FIRM NAME / ADDRESS

EMPLOYMENT — WIFE
FIRM NAME: Home address
POSITION
INCOME OR SALARY
ADDRESS: 2 Fifth Ave, N.Y. 516 AN 3-9450
PHONE NO.
HOW LONG? YRS. MOS.

ACCOUNTS WITH OTHER STORES: Bergdorf Goodman - Macy's - B. Altman
TYPE 17 CEF NUMBER

PERSONAL REFERENCE
NAME / ADDRESS

BANK NAME: Security National Bank
ADDRESS OR BRANCH: Port Washington NY
CHECK [✓] SPECIAL [ ] SAVINGS [ ] LOAN [ ]

RECORD SINCE
SAME PARTY
SIMILARITY
NO RECORD
HA SAME
POB SAME

6/21/71 - Rec. N/JVNE jewelry - [illegible]

TRUSTEES EX3
FOR ID. 2/14/72

CEP RATE
1M EVS 12/13/72
APPROVED

PLEASE READ AND SIGN THE AGREEMENT ON THE REVERSE SIDE.

Exhibit C

RETAIL INSTALLMENT CREDIT AGREEMENT

In consideration of the extension of credit to me, or members, of my family, by Gimbels, from time to time for the purchase of goods and/or services (whether by mail, telephone or otherwise), I agree to pay, the cash sales price of each item so purchased and a FINANCE CHARGE of 1-1/2% per month which is AN ANNUAL PERCENTAGE RATE of 18% , on the previous balance up to $500, (subject to a minimum charge of 50¢) and 1% per month on that portion of the previous balance over $500, which is AN ANNUAL PERCENTAGE RATE of 12% . I understand that the FINANCE CHARGE will be within 7-1/2¢ of the amount computed at the above rates and will be computed on the previous balance without deducting any payments or other credits and without adding current purchases. I will pay my account in monthly installments in accordance with the payment schedule shown. I may pay the "new balance" at any time, and I understand that if I pay the "new balance" within 10 days of receipt of my periodic statement, I will avoid the imposition of any additional FINANCE CHARGE.

Gimbels reserves the right from time to time to change the schedule shown generally for all customers and upon receipt by me of notice of such change, the same shall be deemed incorporated into this agreement: provided that, in the absence of my default, Gimbels will not arbitrarily and without reasonable cause accelerate the maturity of any part or all of the amount then owing.

If I should default in any payment, the entire outstanding balance shall become immediately due and payable at Gimbels' option, and if the account is then referred to an attorney for collection, I will pay an attorney's fee not to exceed twenty percent of the amount then due. This agreement may be terminated at any time by either Gimbels or myself, by notice to the other, but such termination shall not affect my then existing obligations under the agreement.

I understand that a FINANCE CHARGE will not be imposed on a charge account, unless I fail to pay the "new balance" each month when due.

I am over 21 years old Yes ☐ No. ☐ RETAIL INSTALLMENT CREDIT AGREEMENT

Date:_____ BUYER'S SIGNATURE _____

GIMBELS
Broadway at 33rd Street, N.Y., N.Y. 10001

By_____ ADDRESS _____

NOTICE TO THE BUYER:

1. Do not sign this credit agreement before you read it or if it contains any blank space.
2. You are entitled to a completely filled in copy of this credit agreement.

CITY _____ Zip Code ____ STATE ____

☐ **I WOULD PREFER A GIMBELS OPTION ACC**

PAYMENT IN FULL - NO FINANCE CHA

OR

If I Owe:	My Minimum Payme
Up to $60	$10
$60.01 – $ 90.00	$15
$90.01 – $120.00	$20
$120.01 – $180.00	$30
$180.01 – $240.00	$40
$240.01 and over	1/5 of my balan

☒ **I WOULD PREFER A GIMBELS CONTINUOU EASY PAYMENT ACCOUNT.**

Highest Balance	Monthly Payment	Highest Balance	Mont Payn
$ 20-60	5.00	450-500	25.
60-75	6.00	500-600	27.
75-100	7.50	600-700	30.
100-125	9.50	700-800	35.
125-150	11.50	800-900	40.
150-175	12.00	900-1000	45.
175-200	13.00	Over 1000	
200-225	14.50	Special	
225-250	15.50	Arrangement	
250-300	18.00		
300-350	19.00		
350-400	22.00		
400-450	24.00		

F-1605P
(REV. 5-69)

11/5/73

Trustee's 5 Golden Eu...

THE PROVIDENT LOAN SOCIETY

OF NEW YORK

EXECUTIVE OFFICE

346 PARK AVENUE SOUTH, NEW YORK, N. Y. 10010

LAW DEPARTMENT

April 20, 1972

Kenneth A. Zitter, Trustee
One Battery Park Plaza
New York, N. Y. 10004

Re: Mrs. Harriet Faye
Park Avenue South Office

Dear Sir:

A search of the records of all branch offices of the Society from January 1969 to date reveals the following:

Park Avenue South Office

Loan No.	Date	Amount	Collateral
81348	6/16/71	$1,000	diamond-mounted gold evening bag, diamond pendant and stone necklace

On June 22, 1971, a division transaction took place in which the diamond pendant and stone necklace were redeemed upon surrender of ticket No. 81348 and payment of $250.00 and interest of $2.96. New loan ticket No. 81463 was issued for the diamond-mounted gold evening bag for $750.00, details of which you have in our letter of April 12, 1972. All transactions were in the name of Mrs. Harriet Faye, of No. 2 Fifth Avenue, New York City 10011.

Loan No. 81463 was redeemed on July 12, 1971.

Times Square Office (Open Loans)

Loan No.	Date	Amount	Collateral
25657	7/20/71	$3,800	diamond engagement ring
25658	7/20/71	$4,000	diamond ring, two diamond earclips, two diamond pins, diamond necklace, diamond watch bracelet

The collateral for Loan No. 25658 was pledged on March 2, 1971 under Loan No. 23314, and for Loan No. 25657 on June 22, 1971 under Loan No. 25180 by Mrs. Harriet Faye, No. 2 Fifth Avenue, New York City. Both were redeemed on July 20, 1971 by payment of principal of $4,000

Exhibit D

and $3,500 and interest of $276.16 and $48.33 respectively. This collateral was repledged the same day for the amounts as indicated on the preceding table, in the name of Mrs. Harriet Faye by Nat Faye as agent, both of No. 2 Fifth Avenue, New York City.

Description of the collateral pledged is as follows:

Loan No. 25657 - Diamond Engagement Ring, platinum mount, containing one pear-shaped diamond weighing approximately 10.50 carats and two diamonds (tapered) about .70 carat, seven dwt. all;

Loan No. 25658 - Diamond Ring, lady's yellow gold mount, 18 kt., containing 72 full cut diamonds weighing approximately 6.25 carats, one opal weighing about three carats and 12 rubies weighing about 2.50 carats, 14 dwt. all;

Two Diamond Earclips, platinum mount, containing eight full cut diamonds weighing about .35 carat, 22 marquise cut diamonds weighing about 2.35 carats and 46 baguette-shaped diamonds weighing about 2.20 carats, 9 dwt. all;

Diamond Pin, lady's yellow gold mount, 18 kt., containing 14 stones weighing about 1.15 carats, 48 single cut stones weighing about .80 carat and 14 small opals, 11 dwt. all;

Diamond Pin, lady's platinum mount, six pear - shaped diamonds weighing about 1.00 carat, 45 marquise=shaped diamonds weighing about 5.50 carats and 19 calibre emeralds, 12 dwt. all;

Diamond Watch Bracelet, lady's platinum, 17 jewel Swiss, 25/o size, containing 128 full cut diamonds weighing about 8.50 carats, 23 dwt. all;

Diamond Necklace, lady's platinum, containing 127 diamonds weighing about 6.50 carats and two baguette-shaped stones weighing about .16 carat, 18 dwt. all.

Very truly yours,

Robert J. Schneider

Robert J. Schneider
Assistant Secretary

RJS:RG